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Supreme Court, U.S.
FILED
OCT 6 1972
MICHAEL RODAK, JR., CLERK

No. 71-1631

In the

Supreme Court of the United States

HARRIET G. PONTIKES,

Plaintiff-Appellee,

vs.

STANLEY KUSPER, FRANCIS P. CANARY and MARIE SUTHERS, AS THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellants.

DONNA KLAETSCH and PETER LOMBARDO,

Plaintiffs-Appellees,

vs.

GRACE MARY STERN, COUNTY CLERK,

Defendant-Appellant.

MOTION TO AFFIRM

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Defendant-Appellant.

MOTION TO AFFIRM

Now comes the Plaintiff-Appellee, by and through her attorney, Ray Jeffrey Cohen, and in response to the jurisdictional statement heretofore filed states as follows:

1. That the Court should affirm the decision of the special three judge panel heretofore entered since the issues are so clear cut and other decisions throughout the country

based on similar statutes are consistent with that ruling of the three judge panel in striking the "23 month rule" which ruled that the state had no substantial interest which would be required to restrict the change of party affiliation for the purposes of primary voting by a voter. This is consistent with the decision in a South Carolina "calendar year" statute. *Gordon* v. *Executive Committee of the Democratic Party of the City of Charleston* (No. 71-852 D. S.C. 9/22/71); *Yale* v. *Kervin* (D.C. R.I. July 26, 1972, #4883).

2. The decision of this Court and other Circuit Courts with respect to residency requirement cases have consistently held that the voters' right to mobility is superior to the interest of the State in opposing restrictions upon who may vote. *Hadnott* v. *Amos*, 401 U.S. 968 (1971); *Keppel* v. *Donovan*, 326 Fed. Sup. 15.

3. Although we agree that the questions raised herein are of a substantial nature it is the contention of the plaintiff that these matters have been adequately answered by the Court and by other residency requirement cases above cited.

Respectfully submitted,

.....

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IN THE

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OCTOBER TERM, 1972

No. 71-1631

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

VS.

HARRIET G. PONTIKES,

Appellee.

On Appeal From A Three-Judge District Court Of The Northern District Of Illinois

BRIEF OF APPELLANTS

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In The

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October Term, 1972

No. 71-1631

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee.

On Appeal From A Three-Judge District Court Of The Northern District Of Illinois

BRIEF OF APPELLANTS

OPINION.

The opinion of the three-judge court of the United States District Court for the Northern District of Illinois, Eastern Division, in *Harriet G. Pontikes* v. *Stanley T. Kusper, Jr. et al.*, is reported at 345 F. Supp. 1104 (1972) (App. 40).

JURISDICTION OF THIS COURT.

The judgment of the district court was entered on March 9, 1972 (App. 65). Notice of Appeal was filed on April 17, 1972. (Jurisdictional Statement App. 28a).

The Jurisdictional Statement was filed on June 16, 1972. On April 2, 1973, probable jurisdiction was noted, ... U.S. ....., 93 S. Ct. 1540. The jurisdiction of this Court rests on 28 U.S.C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review judgment on direct appeal from a decision of a three-judge court in this case: *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969); and *Anderson* v. *Martin*, 375 U.S. 399, 84 S. Ct. 454 (1964).

STATUTE INVOLVED.

Ch. 46, Ill. Rev. Stat. (1971), §7-43 (Vol. 2, p. 107) provides:

Qualifications of Voters—Regulations Applicable to Primary Elections—Registration Required.

§ 7-43. Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States above the age of 21 years, shall be entitled to vote at such primary.

The following regulations shall be applicable to primaries:

No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliations as required by this Article;

(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town polictical party under the provisions of Section 7-2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate is held.

(e) In cities, villages and incorporated towns having a board of election commissioners only voters registered

as provided by Article 6 of this Act shall be entitled to vote at such primary.

(f) No person shall be entitled to vote at a primary unless he is registered under the provisions of Article 4, 5 or 6 of this Act, when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held. [Amended by Public Act 77-1653, effective September 27, 1971.]

QUESTIONS PRESENTED FOR REVIEW.

1. Did the district court err in deciding a hypothetical case not before the court?

2. Did the district court have jurisdiction of the claims made in plaintiff's complaint?

3. Did the district court err in convoking a three-judge court since the complaint before it involved a purely local matter and, therefore, was not within the ambit of 28 U.S.C. 2281?

4. Should the district court have abstained from determining the constitutionality of §7-43(d) where the statute had not been interpreted by the state court, and where an interpretation could render unnecessary a decision on the constitutionality of the statute?

5. Is §7-43(d) unconstitutional?

STATEMENT OF THE CASE.

On September 28, 1971, plaintiff, Harriet G. Pontikes, filed a complaint in the District Court for the Northern District of Illinois, seeking to enjoin defendants, as members of the Chicago Board of Election Commissioners from enforcing as to her, in precinct 36 of the 50th Ward of the City of Chicago, certain provisions of the Illinois Election Code prescribing qualifications for voters at Illinois primary elections. Plaintiff specifically charged that §7-43(d) which prohibits changing political parties within twenty-three months was unconstitutional. She alleged that she had voted in the primary of the Republican party in the primary held on February 23, 1971, which obviously was less than "twenty-three calendar months" prior to the primary scheduled for March 21, 1972, and asked that defendants be restrained from enforcing that statutory provision to bar her from voting in the Democratic primary scheduled to be held on March 21, 1972. (App. 2-6)

Plaintiff sued solely on her own behalf and did not claim she represented a class or that there was any class situated as she (App. 5). The district court made no finding pursuant to Fed. Rules Civ. Proc. Rule 23, 28 U.S.C. Plaintiff did not state any facts to show that she was being treated in any manner different from others or that her rights to due process of law were violated. The complaint alleged jurisdiction in the district court pursuant to "Title 28, Section 1983, Title 42, § 1971(b)," Article I, Article II and Amendments I, XIV and XVI to the United States Constitution (App. 2).

The primary in which plaintiff alleged she participated on February 23, 1971 was a municipal primary involving only nominations for the offices of mayor, city clerk and city treasurer of the City of Chicago. The primary scheduled to be held on March 21, 1972, in contrast, was a primary of the kind generally held in Illinois prior to a general election and included nominations for governor, United States senator, congressmen in each Illinois congressional district, county officers in Cook County, members of both houses of the state legislature, and elections of delegates and alternates to the national nominating conventions of both parties, as well as election of other political party functionaries including State Central Committeemen and ward committeemen of the City of Chicago (App. 47-48).

Under the provisions of the Election Code of Illinois, such elections are conducted by defendants as the Board of Election Commissioners of the City of Chicago, (hereinafter sometimes referred to as the Board) which at the time of the filing of this case had jurisdiction throughout the City of Chicago and in four adjacent suburban towns, to wit, Berwyn, Cicero, Lyons and Stickney.[1]

The cause was initially assigned to Judge Abraham Lincoln Marovitz. On motion of plaintiff and over the objection of the defendants who contended that the cause did not raise a substantial federal question to warrant it, a three-judge district court was convoked (App. 6-16). Defendants filed an answer denying the material allegations of the complaint (App. 23-29). In conjunction with a similar action filed in the same district court against the Coun-

(1) At this time the towns of Cicero and Stickney are no longer under the jurisdiction of the Board.

ty Clerk of Lake County, Illinois, the county adjoining Cook County on the north,[2] the three-judge court considered plaintiff's motion for summary judgment (App. 16-22, 29-40).

The plaintiff also complained that §7-43(a) which provides in pertinent part:

> "No person shall be entitled to vote at primary: (a) unless he declares his party affiliation as required by this Article: . . ."

and §7-44 which provides in pertinent part:

> "Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges. . . . No person who refuses to state his party affiliation shall be allowed to vote at a primary."

were unconstitutional. The constitutionality of those provisions were upheld by a unanimous court.

The court, with Judge Marovitz dissenting, concluded that § 7-43(d) was unconstitutional and enjoined defendants from enforcing its provisions (App. 40-65).

The opinion of the three-judge court was not limited to the prayer of the complaint which involved only the plaintiff, Harriet Pontikes (App. 5, 49). As a result, in the City of Chicago and the suburban towns under the jurisdiction of the Board, the provisions of § 7-43(d) were not enforced in the primary held on March 21, 1972.

Appeal from this decision of the district court was timely filed and probable jurisdiction noted by this Court.

---

[2] No appeal was taken by the County Clerk from the decision of the three judge court in *Donna Klaetsch & Peter Lombardo* v. *Grace Mary Stern County Clerk*, No. 71 C 2415. According to the docket entries these cases were not consolidated but were argued on the same day.

SUMMARY OF ARGUMENT.

A three-judge district court, ignoring the substantial body of jurisprudence relating to pleading jurisdiction, a cause of action, a claim for which relief may be granted in the federal court, standing and the requirement of a case or controversy under Article III of the Constitution of the United States, constructed a hypothetical case and decided it. Apparently discerning, from the relief requested by the plaintiff, the allegations necessary to establish jurisdiction in the case, the district court supplied those missing allegations of fact and formal assertions of law to enable it to rule on the constitutionality of a state statute. Its action completely ignored the large body of decisions of this Court which instructs the courts and litigants that the federal judiciary should not decide constitutional issues unless there is no other means of disposing of a complaint and claims of the parties.

The failure of the district court to heed the admonitions which are inherent in the precedents caused the district court to make a decision which seems to create a substantial conflict between the State of Illinois and the federal judiciary. Comity, if nothing else, should have caused the district court to abstain from deciding the case, in the light of the long existence of the statutory provision involved, the administrative construction which had never been challenged, and the fact that the statute involved was capable of a construction so that the federal constitutional issue which the district court perceived would not exist.

After erroneously deciding the procedural issues and thus abusing its discretion in considering the case, the dis-

trict court compounded the error by applying an improper standard to its consideration of the constitutionality of Ill. Rev. Stats. 1971, Ch. 46, §7-43(d).

Without a single allegation of fact tending to show any invidious discrimination or denial of the right to vote, the district court applied the most stringent test that this Court has devised to consider the constitutionality of this state statute. Careful analysis of the decisions in which this strict test has been invoked discloses that there is no warrant for the application of the "compelling state interest" test to the statute in this case.

The "compelling state interest" test, though not applicable, was used by the district court to reach a decision which, apparently, it believed would serve some purpose. It cannot be that its purpose was to protect the right of any individual to participate in the primary in the State of Illinois since Illinois law already protects that right and in addition protects the integrity of political parties which this Court has held is a "compelling state interest". To suggest a particular purpose, however, would be to engage in speculation of the sort engaged in by the district court.

Speculation aside, it is clear that the district court has substituted its judgment for that of the legislature in spite of the provisions of Article I, Section 2 and Section 4 of the Constitution and the Tenth Amendment to the Constitution. The conduct of the district court is unwarranted unless the provisions of the Bill Of Rights and other provisions of the Constitution are to be set on several planes, some rights having a higher plane than others. It appears that the district court has determined that the "right to vote" is a right at the very highest plane, to be protected

without regard to the right of the state to carry on its affairs pursuant to the reservation of rights in the Tenth Amendment. Balancing of the rights protected, granted or reserved to the people and the several states is an absolute necessity to prevent the diminution of any of these rights. Unless the Constitution prohibits action by the state, the reservation of power in the Ninth and Tenth Amendments leave to the people and the political process the carrying on of the affairs of the people through the state. The decision of the district court is a perversion of the Constitution of the United States and must not be allowed to stand.

ARGUMENT.

I.

THE DISTRICT COURT DECIDED A HYPOTHETICAL CASE WHICH WAS NOT BEFORE IT.

The opinion of the three-judge court makes certain implicit findings of fact and conclusions of law which are not supported by any allegations in the plaintiff's complaint. This is a significant and fundamental error in the district court's treatment of the case. The court decided the case on plaintiff's motion for summary judgment on assumed facts. It was not supported by any affidavits and at no time was any evidence presented. A comparison of the pleadings with the court's opinion demonstrates that the district court in its zeal to reach issues it wished to decide constructed a hypothetical case to support its jurisdiction and to facilitate its decision of those issues, which were not properly before it.

The court stated that plaintiff Pontikes sought declaratory and injunctive relief under 28 U.S.C. §§ 1343, 2281 and 42 U.S.C. § 1983 (App. 40-41), despite the fact that her complaint did not include any reference to 28 U.S.C. § 1343 or 42 U.S.C. § 1983. Perhaps the court provided this statutory basis for jurisdiction with regard to some of these sections on the principle of a "liberal" reading of the complaint. Liberal construction of pleadings is justified where the pleading has been prepared by lay people. See: *Wallach* v. *City of Pagedale, Missouri*, 359 F. 2d 57 (8th Cir. 1966). This justification, however, does not apply in this case where the plaintiff is represented

by counsel duly admitted to practice in the district court, and where there is no suggestion that that counsel is incompetent. Though the complaint and the court mentioned "declaratory relief" neither makes any reference to 28 U.S.C. § 2201. § 2201 provides a remedy which did not exist in the common law. We suggest that ordinary rules of construction require that where one seeks a remedy provided by statute that the pleading should formally assert that the statute is relied upon by the complainant. See Fed. Rules Civ. Proc. Rule 84 and Form 2, 28 U.S.C.

The court stated that the basis of plaintiff's claim was the denial of the right to vote and right of association, and then decided that these rights were denied. In deciding that the right of association was denied the court assumed plaintiff to be a part of a group of plaintiffs who wished to change parties. Plaintiff here made no claim though that she was a part of any group of people with a similar intent or that she was suing as a representative of any class. As discussed, *infra*, section II, such an "association" existing at the time of the filing of the complaint would be necessary to bring this suit within the cases concerning the "right of association."

This unwarranted treatment of plaintiff as a member of a group, without any evidence to demonstrate it or any allegation of it, also bears on the court's determination that it had jurisdiction of plaintiff's claim that she was denied her right to vote. As is argued, *infra*, section V, the claim that she was denied her right to vote is not warranted by any section of the Illinois Election Code.

Additionally, the entry of injunctive relief was not supported by allegations necessary to satisfy even the

elementary requisites for entry of such equitable relief. There is no allegation of any irreparable injury to plaintiff nor any evidence offered. See *Toomer* v. *Witsell*, 334 U.S. 385, 68 S.Ct. 1156 (1948).

The jurisdiction of the court to grant declaratory relief is not supported. Neither plaintiff's complaint nor the court's decision nod at the factual allegations necessary to support a request for declaratory judgment. In this instance, the case for declaratory judgment relief was not hypothetical, it was non-existent. The complaint fails to state facts to show the existence of a case or controversy. See *Aetna Life Insurance Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227, 57 S.Ct. 461 (1937). A thorough examination of this problem was made by this Court in *Poe* v. *Ullman*, 367 U.S. 497, 81 S.Ct. 1752 (1961). It is clear that a plaintiff seeking a declaratory judgment must be able to show that the statute is invalid and that the plaintiff is in immediate danger of sustaining injury as a result of its enforcement. This Court should not approve the use of the remedy of declaratory judgment to enable a plaintiff to have judicial consideration of the constitutionality of a state statute which she cannot demonstrate in fact deprives her of a right granted or protected by the Constitution of the United States. Advisory opinions have never been approved by this Court and we respectfully suggest that it would be inappropriate at this time to enter upon that course.

Ignoring all of these blatant deficiencies and the total lack of evidence, the court rushed to consider the constitutionality of § 7-43(d). It determined that the statute could only be justified by the showing of a "compelling state interest". The court then found that the

possibility of party raiding did not justify the statute, for party raiding was less likely to occur than other party switching. That this determination of fact was made in an evidentiary vacuum and is pure speculation, is supported by the statement of the majority of the district court in its opinion when it says "there is no evidence to indicate that raiding is more likely to take place than 'honest' switches of affiliation" (App. 45-46). It is significant that no opportunity was ever provided by the court for the reception of evidence on this fact question.

It is this construction of a hypothetical case which enabled the district court to reach the question of the constitutionality of § 7-43(d) in the case at bar.

II.

THE DISTRICT COURT DID NOT HAVE JURISDICTION TO DECIDE THIS CASE.

Plaintiff failed to satisfy the fundamental requirement of stating a proper claim in the federal district court in this case. Rule 8(a) of the Federal Rules of Civil Procedure sets out the general rules of pleading claims for relief. Those requirements are (1) "a short plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short plain statement of the claim showing the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled . . . ." The plaintiff has not satisfied these requirements. Neither does the plaintiff make sufficient allegations to show that she has standing to sue.

It does not appear that this Court has specifically ruled on the question of what satisfies the requirements of a

short statement of the grounds on which the federal district court's jurisdiction depends. This requirement is usually satisfied by a formal assertion of the statutory basis on which the district court's jurisdiction is invoked and a formal assertion of the statutory or constitutional basis for the claim thereafter set out in the complaint. In adopting the Federal Rules of Civil Procedure, this Court provided in Rule 84 that the types of allegations set out in the forms in the appendix were sufficient under the Rules. Form 2 entitled *Allegation of Jurisdiction* appears to require that a formal assertion of the basis of federal jurisdiction, including the statute involved, be included. An examination of the complaint (App. 2-6) discloses that at best the plaintiff does not make the formal assertions that are necessary to show that there is jurisdiction in the United States District Court pursuant to the United States Code.

In any event, the defendants in their answer challenged plaintiff's jurisdictional assertions (App. 23). It is well settled that if the formal assertions of jurisdiction are controverted that the plaintiff has the burden of demonstrating that there is in fact jurisdiction in the United States District Court. See *Pan American Petro Corp.* v. *Superior Court of Delaware,* 366 U.S. 656, 81 S. Ct. 1303 (1961); *Gully* v. *First National Bank in Meridian,* 299 U.S. 109, 57 S. Ct. 96 (1936); *McNutt* v. *General Motors Acceptance Corporation Of Indiana, Inc.,* 298 U.S. 178, 56 S. Ct. 780 (1936). Plaintiff made no such showing. In spite of the traverse made by the defendants in this case to the jurisdictional assertion, the district court ignored the challenges to its jurisdiction and proceeded to hear the case without considering this basic deficiency

in plaintiff's pleadings. It is not the position of the defendants that the district court had no authority to consider the complaint, since a court always has the authority to determine whether or not its jurisdiction has been properly invoked. It is the position of the defendants, however, that the traverse of the formal assertions of jurisdiction were sufficient to put the court on notice that the defendants were of the view that the district court did not have jurisdiction of this cause.

Plaintiff's complaint also fails to satisfy the second requirement of Rule 8(a) because it does not contain a plain and concise statement of the claim showing the pleader is entitled to relief. The complaint is devoid of any statement of fact or reference to fact to support the conclusion of the plaintiff in paragraph 8 of Count I that "the plaintiff will be denied her constitutional right to vote on March 21, 1972, by Chapter 46, Section 7-43, Ill. Rev. Stat. (1971) infra." (App. 4). The complaint does not allege that the Illinois Election Code invidiously discriminates against the plaintiff. There is no claim of racial or ethnic discrimination. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S. Ct. 125 (1960); *Smith* v. *Allwright*, 321 U.S. 649, 64 S. Ct. 757 (1944); *Hadnott* v. *Amos*, 394 U.S. 358, 89 S. Ct. 1101 (1969). Nor does the plaintiff claim discrimination based upon geographical location. *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969); *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964). Nor has the plaintiff claimed an invidious classification based upon poverty. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966). Nor has the plaintiff claimed discrimination or classification based upon political beliefs or party affil-

iations. *Hadnott* v. *Amos*, supra; *Williams* v. *Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968). It is thus clear that the complaint does not state a claim upon which relief can be granted under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States since there is no claim here of any invidious classification which is the gravamen of a denial of equal protection. See *Snowden* v. *Hughes*, 321 U.S. 1, 64 S. Ct. 397 (1944).

In addition a comparison of paragraph 4 of plaintiff's complaint and paragraph 7 of plaintiff's complaint (App. 2-3) make it clear that the gravamen of plaintiff's complaint is not that she will be denied the right to vote by the Illinois Election Code, but that she wishes to vote in a particular party primary and the Illinois Election Code does not provide for her participation in that primary (See App. 24-25). Article I, Section 2 of the Constitution of the United States leaves to the states the qualifications of electors, in the several states. Article I, Section 4 of the Constitution of the United States does not change the power reserved to the states except to provide that the Congress may, by law, make or alter regulations concerning the times, places and manner of holding elections for members of the Congress of the United States. This Court, as recently as *Oregon* v. *Mitchell*, 400 U.S. 112, 91 S. Ct. 260 (1970) recognized that the states have the power to regulate elections under the Tenth Amendment to the Constitution of the United States and Article I, Sections 2 and 4 of the Constitution subject to the limitations set out in Amendments Fifteen, Nineteen, Twenty-four and Twenty-six to the Constitution.

The fact that this Court in *U. S.* v. *Classic,* 313 U.S. 299, 61 S. Ct. 1031 (1941) and in *Smith* v. *Allwright,* 321 U.S. 649, 64 S. Ct. 757 (1944) determined that federal courts had jurisdiction to determine whether or not the states regulation of primary elections passed constitutional muster, did not determine that the federal courts had jurisdiction of every claim made concerning a state primary election. We respectfully suggest that the precedents now make clear the circumstances in which there is jurisdiction under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States for the federal courts to act in cases involving primary elections. One of the circumstances is where there is a claim of denial of equal protection because of invidious classification or discrimination. Plaintiff's complaint does not satisfy that requirement.

The plaintiff in her assertion of jurisdiction also mentioned the First Amendment to the Constitution of the United States. The district court, in its opinion, stated that the plaintiff charged that Ill. Rev. Stats. (1971), ch. 46, §7-43(d) is unconstitutional because it impinged on the plaintiff's right of association. We respectfully suggest that the district court improperly relied on the First Amendment right of association as a basis for its decision in this case. Apparently, the plaintiff and the district court misread the numerous cases decided by this Court on the subject of the state constitutional power to regulate voting and the Fourteenth Amendment right of association.

It appears that the Fourteenth Amendment right of association was first applied to voting cases in *Williams* v. *Rhodes,* 393 U.S. 23, 89 S. Ct. 5 (1968). In the *Wil-*

liams case this Court dealt with an effort by a group of people supporting a candidate to secure a place on the ballot for that candidate in order to express a political point of view which was different from that of the established political parties. It appears that the plaintiffs in that case claimed a denial of equal protection and a denial of due process under the Fourteenth Amendment because they were not permitted to assemble and espouse their political tenets and were, therefore, denied the right to cast their votes effectively. It is significant, we submit, that the plaintiffs' rights in *Williams* were being protected as this Court had theretofore protected the rights of groups on the basis of a "right of association" in *N.A.A.C.P.* v. *Alabama ex rel Patterson,* 357 U.S. 449, 78 S. Ct. 1163 (1958), *Bates* v. *City of Little Rock,* 361 U.S. 516, 80 S. Ct. 412 (1960), *United Mine Workers of America* v. *Illinois State Bar Association,* 389 U.S. 217, 88 S. Ct. 353 (1967), *United Transportation Union* v. *State Bar of Michigan,* 401 U.S. 576, 91 S. Ct. 1076 (1971). In all of those cases this Court appears to have determined that the "right of association" was a right protected by the Constitution of the United States to groups who had come together for a reason pursuant to the due process clause of the Fourteenth Amendment.

In the case at bar, there is a lone individual seeking to invoke that right of association without first "associating" with any other person with an aim to participate in a particular political party primary. There does not appear to be any case which has determined that there is a federal right to participate in a particular party primary election or indeed to associate without the consent of others. The plaintiff in her complaint does not disclose how the state law involved here denies to

her the right to vote. The only right to vote that can exist at the primary is the right to participate in the nomination of candidates by the political parties and we respectfully suggest that that right exists in Illinois without regard to whether a party primary is held or whether the nomination is by other means. New political parties and so-called "independents" are also provided for by the Illinois Election Code. (Ill. Rev. Stats. (1971), ch. 46, §§10-1 et seq.) Plaintiff does not say that the Illinois statute denies her the right to participate in the nominating process of some political party or group. Indeed she cannot make such a statement considering the other provisions of the Illinois Election Code providing for her participation. We respectfully submit that *Smith* v. *Allwright*, supra, and its progeny does not grant more to any citizen as we hereafter demonstrate in Section V of this brief.

There is no allegation in plaintiff's complaint which would place the defendants on notice of the basis for the claim which they are called upon to meet. Thus, the district court's assertion that the plaintiff's claim is grounded upon the right of association and the right to vote is unwarranted by the most liberal standards being applied to plaintiff's complaint. This complaint has not had the benefit of being expanded by the presentation of facts in support of the claim and thus cannot satisfy the requirements of *McNutt* v. *General Motors Acceptance Corporation of Indiana, Inc., supra.*

The relevant standards concerning "standing" are not met by the plaintiff and considering Rule 11 of the Federal Rules of Civil Procedure and the Illinois Election Code, the plaintiff cannot make the statement that she

is denied the right to participate in the nominating procedure in Illinois.

Plaintiff has failed to allege facts to show she has standing to pursue the claims she made because she has not shown that she suffers in any way differently than others by the application of the statute. It is not enough that a party suing may allegedly suffer with the public generally. The leading case on this subject is *Commonwealth of Massachusetts* v. *Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601 (1923). In that case this Court pointed out:

> The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

This doctrine was reaffirmed in *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-424, 89 S.Ct. 1843, 1848-1850 (1969). Plaintiff makes no allegation of how Ill. Rev. Stats. (1971) Ch. 46, § 7-43(d) affects her in some way different from any other person and does not claim that she is a member of any class. Rule 23 F.R.C.P. (App. 2-6).

It is clear that the plaintiff's complaint does not state a claim upon which relief may be granted either from the standpoint of the due process clause or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and that the plaintiff is without standing to maintain this action. The district court properly determined that plaintiff's claim under 42 U.S.C. § 1971 was not sufficient to warrant relief being granted (App. 48). This Court should decide that Count I of plaintiff's complaint likewise is inadequate because a claim for relief within the jurisdiction of the district court was not stated.

III.

THIS MATTER WAS NOT PROPERLY BEFORE A THREE-JUDGE DISTRICT COURT.

Succinctly stated, the issue raised by plaintiff's challenge of the constitutionality of §7-43(d) in the context of the facts in this case, is whether her participation in the Republican Party Primary for the nomination of persons to run for municipal offices bars her from voting in the Democratic Party Primary in the 36th precinct of the 50th Ward of the City of Chicago in regard to the nomination of persons to run for county and statewide offices. This is not an issue of statewide concern, nor does the lawsuit raise a substantial federal question by challenging the conduct of primaries other than in the area within the jurisdiction of the Board (App. 2-6).

The questions to be answered in determining whether issues raised by a complaint are only of local concern and thus not within the jurisdiction of a three-judge court under 28 U.S.C. 2281, are:

(1) whether the state statute which is challenged is one of general application or whether it affects only a particular area: *Board of Regents of the University of Texas System* v. *New Left Education Project*, 404 U.S. 541, 92 S.Ct. 652, 654-655 (1972); *Ex parte Collins*, 277 U.S. 565, 561-569, 48 S.Ct. 585, 586 (1928); *Rorick* v. *Board of Commissioners of Everglades Drainage District*, 307 U.S. 208, 212-213, 59 S.Ct. 808, 810-811 (1939); *Moody* v. *Flowers*, 387 U.S. 97, 101-102, 104, 87 S.Ct. 1544, 1548, 1549 (1967); and

(2) whether the officer sought to be enjoined is a state officer performing a state function. *Spielman Motor*

Sales Co. v. *Dodge*, 295 U.S. 89, 55 S.Ct. 678 (1935); *Rorick* v. *Board of Commissioners of Everglades Drainage District*, 307 U.S. 208, 59 S.Ct. 808 (1939).

The question of whether or not these requirements are satisfied must be answered in the negative on the facts of this case. This Court in *Moody* v. *Flowers*, 387 U.S. 97, 101-102, 104, 87 S.Ct. 1544, 1548, 1549 (1967) stated:

> The officer sought to be enjoined must be a state officer; a three-judge court need not be convened where the action seeks to enjoin a local officer (*Ex parte Collins, supra; Rorick* v. *Board of Commissioners, supra*) unless he is functioning pursuant to a statewide policy and performing a state function. *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322. Nor does the section come into operation where an action is brought against state officers performing matters of purely local concern. *Rorick* v. *Board of Commissioners, supra.* . . . In No. 624, the constitutional attack was directed to a state statute dealing with matters of local concern—the apportionment and districting for one county's governing board. The statute is not a statute of statewide application, but relates solely to the affairs of one county in the State. The fact that state officers were named as defendants cannot change the result.
>
> It is said that there is enough similarity between this law and the laws governing other Alabama counties as to give this case a statewide interest. It is said that 29 counties having a city of consequence located within their borders have the same "crazy quilt" of malapportionment to insure rural voters' control. It is said that 32 other counties provide for election of county board members at large but with a local residence requirement which insures rural control. It is said that six rural counties elect their

governing bodies on an at-large basis with no local residence requirement. We indicate no views on the merits. But we do suggest that even a variety of different devices, working perhaps to the same end, still leaves any one device local rather than statewide for purposes of the statutory three-judge court. . . . Since the "statute" in each of these cases is one of limited application, concerning only a particular county involved in the litigation, a three-judge court was improperly convened. Appeals should, therefore, have been taken to the respective Courts of Appeals, not to this Court. Since the time for perfecting those appeals may have passed, we vacate the judgments and remand the causes to the court which heard each case so that they may enter a fresh decree from which appellants may, if they wish, perfect timely appeals to the respective Court of Appeals. (citation omitted)

In the context of the facts in this case the issues raised are local. The sole defendants in the case are the Board and its members which had jurisdiction only over the City of Chicago and four suburbs. Ill. Rev. Stats. (1971) Ch. 46, 6-1 *et seq.* It was created by virtue of the vote of the citizens within its jurisdiction. Ill. Rev. Stats. (1971) Ch. 46, § 6-2.

The suit concerns the effect of only plaintiff's participation in the municipal primary in the City of Chicago where the two major political parties field candidates. Municipal primaries are not held throughout the state but only in certain areas, and even where they are held the major political parties do not always field candidates. Thus, § 7-43(d) only has the effect of which plaintiff complains in certain local areas in the state. This is the kind of situation involved in *Board of Regents of*

the University of Texas System v. *New Left Education Project, supra,* and *Rorick* v. *Board of Commissioners, supra.* The case at bar was indeed a local complaint.

Importantly, the plaintiff and the district court did not concern themselves with complying with the requirements of 28 U.S.C. § 2284(2). An examination of the docket entries and the record on file in this cause does not disclose that the attorney general and the governor of the State of Illinois were given any notification of the hearing in this case. We respectfully submit that this being a statutory action that the requirements of the statute must be met in order to vest jurisdiction in the statutory three-judge court. This failure to comply with the statute is yet another indication of the deficiencies in this entire case.

Of even more significance is the failure of the district judge, to whom this case was initially assigned, to properly determine that a substantial federal question had been raised by the pleadings in this cause sufficient to warrant the convoking of a three-judge court. The fact that this cause has been heard by such a court does not prevent this Court from considering whether the three-judge court had jurisdiction in the first instance. *Swift & Company* v. *Wickham,* 382 U.S. 111, 114, 86 S.Ct. 258, 260 (1965). An examination of the opinion of the district judge on the motion for a three-judge court (App. 11-16) disclosed that the district judge at that time, as the court in the decision of this case, was confused concerning the relevant standard for determining whether there was a substantial federal question present.

The court, in a bootstrap operation, relied primarily on a case which had been decided in that district court,

Caryl Bendinger, et al. v. *Richard Ogilvie,* 335 F. Supp. 572 (N.D. Ill. 1971). In that case a three-judge court applying the compelling state interest test had decided that a substantial federal question was involved in an attack on the durational party membership requirement for candidates. The court also relied on *Gordon* v. *Executive Committee of the Democratic Party of the City of Charleston,* 335 F. Supp. 166 (D.S.C. 1971); *Rosario* v. *Rockefeller,* No. 71C 1573 (E.D.N.Y. Feb. 10, 1972). Those cases are inappropriate authority for determining that there was a substantial federal question in this case. Generally, this Court has determined that a single plaintiff is without standing to attack the validity of a statute unless that litigant is harmed in a manner differently than other citizens are harmed by that statute. *Frothingham* v. *Mellon,* 262 U.S. 447, 43 S.Ct. 597 (1923), and *Jenkins* v. *McKeithen,* 395 U.S. 411, 89 S.Ct. 1843 (1969). Certainly this question of standing is determinative of the question of whether there is a substantial federal question raised by the pleadings. An examination of *Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691 (1962), discloses that this Court has required that a person seeking a remedy for injury done to important rights of a significant portion of the citizens of a community, demonstrate that he represents the interest and concerns of persons other than himself, has suffered a real injury and is not merely making the claim to protect a right possessed by every citizen to require that government be administered according to law. The single litigant seeking only to vindicate a right in a single precinct of the City of Chicago, a city of over 3,000 precincts, hardly meets that test.

If this Court will consider that plaintiff's complaint does not state how Ill. Rev. Stats. (1971) Ch. 46, § 7-43(d) deprives her of any right protected by the Constitution of the United States, it becomes clear that the district court supplied, probably without realizing it, facts which are necessary to state a cause of action. We respectfully submit that without a cause of action being stated, no substantial federal question arises. The memorandum opinion concerning the motion for a three-judge court is wholly devoid of any suggestion that any Fourteenth Amendment or Fifteenth Amendment right of this plaintiff was interfered with or denied.

We respectfully suggest that the requirements of *Ex parte Poresky*, 290 U.S. 30, 54 S.Ct. 3 (1933) and *Idlewild Bon Voyage Liquor Corporation* v. *Epstein*, 370 U.S. 713, 82 S.Ct. 1294 (1962) have not been met by the complaint in this cause and the district judge improperly requested the Chief Judge of the United States Court of Appeals for the Seventh Circuit to convoke a three-judge court. We respectfully suggest that in this case, as in *Moody* v. *Flowers, supra*, this Court should vacate the order convoking the three-judge court and the judgment and remand the cause to the court which heard the case so that it may enter a proper decree.

IV.

THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM DECIDING THE CONSTITUTIONALITY OF SECTION 7-43(d).

This was a proper case for the application of the doctrine of abstention by the district court. The statute which plaintiff challenges has not been interpreted by a

state court with respect to the factual circumstances raised by the plaintiff here. It is possible that the state court would interpret § 7-43(d) to prevent a federal constitutional question arising. Until the state court interprets the state statute the federal court should abstain from deciding the constitutional issue. *Reetz* v. *Bozanich*, 397 U.S. 82, 90 S.Ct. 788 (1970), *Lake Carriers' Association* v. *MacMullan*, 406 U.S. 498, 92 S.Ct. 1749 (1972).

The plaintiff in the case at bar has suggested that Ill. Rev. Stats. (1971) Ch. 46, § 7-43(d) prevents her from participating in the statewide Democratic Party primary because she had participated in the City of Chicago Municipal Republican Party primary less than twenty-three months previously. The Illinois Supreme Court had interpreted that statute previously but refused to determine whether participation in a municipal primary limits participation in a statewide primary because the party raising it did not have standing. In that case, *Faherty* v. *The Board of Election Commissioners of the City of Chicago*, 5 Ill. 2d 519, 126 N.E. 2d 235 (1955), the Supreme Court of Illinois held, as to the matters properly before it, that neither the Republican nor the Democratic Party was a political party "within the city . . . only", within the meaning of § 7-43(d) because both of those parties are statewide and countrywide political parties. Therefore, the court concluded that one who voted in a major party primary conducted on a statewide basis was barred from participating in a municipal primary of another party within the twenty-three month period.

Whether the Illinois court would construe § 7-43(d) as requiring the reverse, however, namely that voting in

a purely municipal primary within the twenty-three month period would bar voting in the primary of the other party, is not clear either from the decision in the *Faherty* case or the language of the statute. Accordingly, this is a proper case for the application of the doctrine of abstention. *Fornaris* v. *Ridge Tool Company,* 400 U.S. 41, 91 S.Ct. 156 (1970). Obviously if the statute had been construed so as not to bar plaintiff from voting in the March 21, 1972 Democratic Party primary, there would have been no federal question in this case, even by the erroneous standard applied by the district court.

The effect of the district court's decision that § 7-43(d) is unconstitutional was also inappropriate without the state courts first considering it. This section is an integral part of the complex election machinery which protects the integrity of political parties and insures the fair and equitable enforcement of the election laws in the registration and challenge of voters and the conduct of the election. In *Jackson* v. *Ogilvie,* 401 U.S. 904, 91 S.Ct. 642 (1971) this Court in applying the doctrine of abstention in a case involving the Illinois Election Code said:

> While these issues are by our federal standards 'justiciable', federal courts are usually less able than state courts to work their way through a maze of state electoral laws. If federal courts take the laboring oar in these so-called "emergency" cases involving local electoral laws, they must make quick decisions on local law issues that are often tangled with matters of local construction and administration.

The wisdom of abstention becomes clear when one considers the other sections of the Illinois Election Code affected by the decision of the district court.

Section 7-43(d) is an integral part of the election system in Illinois. The twenty-three month limitation which assists in preserving party integrity, facilitating identification of party members, and carries out the basic principle of party politics which is the mainstay of the election processes in this country. This limitation that a person cannot vote in a party primary if he has voted in another party's primary within twenty-three months is consistent with and part and parcel of the effective conduct of the Illinois election system. See the Appendix attached to this Brief.

Throughout the Election Code, there are requirements that persons participating in the election process be either from a political party, a qualified primary elector of a party, affiliated with a party, a qualified primary voter, or in the same political party as someone else. Often the standard to be used to identify these persons is not defined. Because of the requirement in § 7-43(d) that, to vote in a party primary thus showing party affiliation, a person must not have voted in the primary of another party within twenty-three months, the unchallenged administrative rule has been to use this as the standard of party affiliation when none has been provided by the statute. To declare § 7-43(d) unconstitutional is to cripple a system which, to work well, often depends on the participation of members of opposing parties.

From the outset party affiliation is required for deputy registrars, one from each of the political parties to register persons. No standard for their selection is provided (§ 6-50.2). Persons who sign nomination petitions of candidates who wish to run in a party primary, must show

they are qualified primary electors of that party. The standard there is that said elector has not voted in another party primary within two years (§ 7-10). The candidate must satisfy the same standard.

The conduct of the election, primary or general, by the judges of election depends on the adversary system created by having, out of the five judges of election, two of one party and three of the other party (§§ 7-26, 7-28, 14-1, 14-2, 14-3.1, 14-3.2, 14-4, 14-6). These judges are usually selected prior to election day and many are sworn in on election day. One judge of each party, to insure fairness, is required to be present to provide assistance to voters when needed (§ 17-14), and all the judges participate in the canvass of the vote (§ 17-18, also see §§ 17-18.1, 18-9). The purpose of having both major parties represented is to insure the honesty of the election by means of an adversary system. The system will not work if the election judge is not really affiliated with the party he represents and is actually in sympathy with the opposite party. Thus the check of the proposed judge's voting record using the standard in § 7-43(d) is an effective way of identifying the proposed election judge's actual party affiliation.

The voters who wish to vote in a particular party primary who are challenged as being ineligible are also measured by the § 7-43(d) standard which is part of the provisions of § 7-45 setting forth the contents of the challenged voter's affidavit which the elector must execute before he is allowed to vote.

The defendants, in carrying out the duty and responsibility of protecting the elections from fraud and

overreaching and protecting the integrity of political parties, have administratively construed the Illinois Election Code. They apply the party affiliation test set out in §7-43(d) to other provisions of the Code where the political party affiliation of the voter is necessary to protect the integrity of the political party, the nomination procedure and the election. This administrative construction of the Election Code has been necessary since the adoption of the Code in 1943 and there has been no suggestion that the administrative construction has not been consistent. It is well settled in Illinois that a long standing administrative interpretation of a statute is entitled to great weight when the statute is considered by a court. *Cook County* v. *Healy*, 222 Ill. 310 (1906), *Fried* v. *Danaher*, 46 Ill. 2d 469, 263 N.E. 2d 280 (1970). To the same effect are *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884 (1960) and *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137, 80 S.Ct. 1392 (1960). §7-43(d) is an integral part of the elaborate and complex Illinois election system. Interpretation of it as unconstitutional will have a profound effect on the balanced and equitable administration of the Illinois system. The final authority to interpret this state statute rests in the Supreme Court of Illinois. The district court should have restrained itself so as to avoid the waste of a tentative decision as to state law and the premature adjudication of a constitutional question. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941). The federal court should abstain and let the state court first take the laboring oar to interpret it.

V.

THE DISTRICT COURT ERRED IN DECLARING SECTION 7-43(d) UNCONSTITUTIONAL.

The district court's assertion that section 7-43(d) of the Illinois Electoral Code prevents participation in the electoral process (App. 43-47) is unwarranted. A plain reading of the statute shows that the only fair comment concerning the section is that it regulates the participation in a particular party's primary if an elector, who by past conduct within twenty-three months, has demonstated an allegiance to another political party. The Illinois courts in interpreting this section have not decided whether participation in a municipal primary of one party prohibits participation in the primary of another party on a statewide level. See *Faherty* v. *Board of Election Commissioners of Chicago*, 5 Ill. 2d 519, 126 N.E. 2d 235 (1955).

In order to place § 7-43(d) of the Illinois Election Code in proper prospective, it is necessary to consider other sections of the Election Code which provide for nomination of candidates for the general election by means other than a primary. Section 10-1 et sequitor provide for nomination in the general election by persons not members of a recognized political party. Sections 10-1 et sequitor also provide for the formation of new political parties. Taken all together it is clear that participation in the nominating process is available to any qualified elector in the State of Illinois without regard to race, geographical location, sex poverty or any other restriction.

This Court has never suggested that the "party system" interferes with any individual right protected by

the Constitution of the United States. What this Court has decided is that access to the primary or any other part of the election process may not be denied on irrational or invidious grounds such as color, military status, durational residence requirements or other grounds determined to be invidious. *Smith* v. *Allwright*, 321 U.S. 649, 64 S.Ct. 757 (1944), *Carrington* v. *Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965), *Dunn* v. *Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972) and *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 26 S.Ct. 1079 (1966). None of those decisions either separately or in combination adds up to a condemnation of the "party system". Indeed, in *Williams* v. *Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968), this Court made it clear that the Constitution did not permit state statutes to stand which interfered with the formation of new political parties. As recently as *Rosario* v. *Rockefeller*, ... U.S. ....., 93 S. Ct. 1245 (1973) this Court announced that the protection of political parties was a legitimate state goal which justifiies some minimal interference with the desires of persons in New York to participate in party primaries without any restrictions. The district court's decision below effectively nullifies the attempts by the Illinois legislature to achieve that protection. This Court therefore must examine the standard used by the district court to hold section §7-43(d) unconstitutional.

The district court determined that the plaintiff's attack against § 7-43(d) was grounded upon the right of association and the right to vote and stated:

> Where a deprivation of the right to association or the right to vote is at stake, the statute will only be upheld if the state proves that it serves a 'compelling' state interest. (App. 44)

The "compelling state interest" standard has been approved by this Court in numerous situations, all involving inherently suspect classifications; for example: denial of the right to vote because of poverty, *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966); mandatory sterilization of particular classes of criminals, *Skinner* v. *State of Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110 (1942); curtailment of civil rights of a racial group, *Korematsu* v. *U.S.*, 323 U.S. 214, 65 S.Ct. 193 (1944); interference with freedom of religion, *Sherbert* v. *Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963); and interference with associational rights *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S.Ct. 328 (1963). As we point out in Section II of this brief, the plaintiff has not alleged any classification or alleged facts from which one might conclude that there is a classification made by the statute whether invidious or otherwise.

It appears that the "compelling state interest" test was really first applied to voting cases in *Williams* v. *Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968). In that case this Court was protecting the rights of a group of people who had come together to espouse a political point of view which they believed to be different from that of either of the major political parties. The Ohio statute made it extremely difficult, if not impossible, for that group to secure a place on the general election ballot for its candidate, thereby preventing them from casting a vote for a candidate who might represent them and their political views in the halls of government. In the case at bar, the plaintiff, a lone individual, is not attempting to join with others to place a candidate on the general election ballot who espouses a political point of view different from

those of the established political parties. She seeks to participate in the affairs of an established political party in the nominating process without complying with the state regulations which have been adopted by the legislature, regulating who may participate, the circumstances in which a person may participate and providing safeguards for established political parties. We submit that none of this denies the right to participate in the electoral process.

In *Rosario* v. *Rockefeller, supra,* this Court considered the question of whether or not only an enrolled member of a political party could vote in that political party's primary and determined that a regulation concerning participation in a particular political party's primary was in no sense invidious. In that regard, section 7-43(d) is not unlike section 186 involved in *Rosario.* Neither statute denied the electoral franchise. Similarly, section 186 in *Rosario* and section 7-43(d) in this case merely place time limitations on participation in a particular party's primaries. Section 7-43(d) does not prevent the plaintiff from voting in the 1972 primary but merely postpones her participation in the nominating process of the Democratic Party. See: Ill. Rev. Stats. Ch. 46, § 7-43(b)(c) and § 7-10.

We do not urge that there is any constitutional infirmity in the "compelling state interest" test. We only urge that there is no justification in the precedents for applying a "compelling state interest" test to section 7-43(d). Analysis of the statute and its effect, along with the balance of the Illinois Election Code, clearly shows that no due process right of the plaintiff is threatened and she has not been denied the right to vote or threat-

ened with a denial of the right to vote by the Illinois Election Code.

The decisions of this Court in *Williams* v. *Rhodes, supra,* and *Lippitt* v. *Cipollone,* 357 F. Supp. 1405 (N.D. Ohio, 1971) affirmed 404 U.S. 1032, 92 S. Ct. 729 (1972) clearly show that the preservation of the political parties is a "compelling state interest". Since *Merchants Exchange* v. *Missouri,* 248 U.S. 365, 39 S.Ct. 114 (1919), it has not been doubted that the state had the power to enact such legislation as was necessary for the prevention of fraud, cheating, and imposition. We respectfully suggest that that power for the protection of commercial transactions cannot be more than the power the state has to protect the integrity of the election process. This Court has approved the protection of political parties in *Ray* v. *Blair,* 343 U.S. 214, 72 S.Ct. 654 (1952), *Williams* v. *Rhodes, supra, Lippitt* v. *Cipollone, supra, Rosario* v. *Rockefeller, supra,* and approved protecting the integrity of the election process in *Hadnott* v. *Amos,* 394 U.S. 358, 89 S.Ct. 1101 (1969).

The party system of the United States did not begin with the founding of the republic, but from the very beginnings of this country, the development of various political theories and tenets has been such that Calvin Coolidge in his inaugural address on March 4, 1925 said:

> . . . Since its very outset, it has been found necessary to conduct our Government by means of political parties. That system would not have survived from generation to generation if it had not been fundamentally sound and provided the best instrumentalities for the most complete expression of the popular will. It is not necessary to claim that it has always worked perfectly. It is enough to know that nothing

better has been devised. No one would deny that there should be full and free expression and an opportunity for independence of action within the party. There is no salvation in a narrow and bigoted partisanship. But if there is to be responsible party government, the party label must be something more than a mere device for securing office. Unless those who are elected under the same party designation are willing to assume sufficient responsibility and exhibit sufficient loyalty and coherence, so that they can cooperate with each other in the support of the broad general principles, of the party platform, the election is merely a mockery, no decision is made at the polls, and there is no representation of the popular will. Common honesty and good faith with the people who support a party at the polls require that the party, when it enters office, to assume the control of that portion of the Government to which it has been elected. Any other course is bad faith and a violation of the party pledges. [Inaugural Addresses of the Presidents of the United States from George Washington 1789 to Richard Milhous Nixon, 1969, 91st Congress, 1st Session, House Document 91-142 (1969)].

Thus it appears that the legislative, the executive and the judicial branches of government have recognized that political parties are a necessary and integral part of the government of this country and the carrying on of the election process. The opinion of the dissenting judge in the district court makes it eminently clear that once the "compelling state interest" exists to protect political parties and the integrity of the election system that the harm from which the political parties and the election system is being protected in this case is very real. Though the record in this case does not show it, it is quite pos-

ible that in the jurisdiction of the Chicago Board of Election Commissioners in 1972, the outcome of the elections might well have been determined by those persons switching from the Republican Party to the Democratic Party in an effort to cause the election of the Republican candidates. It appears that the plaintiff might well be one of those who believed that the best way to elect a Republican Party member was to cause an inept, unattractive person to be nominated by the Democratic Party. This possibility, recognized by the dissenting judge in the district court, might well now be realized.

The misapprehension of the district court of the proper standard to be applied in considering whether section 7-43(d) improperly interferes with a constitutional right of the plaintiff does not necessarily vitiate the decision of the district court. The district court in commenting on the constitutionality of Section 7-43(d) in its opinion apparently considered that the plaintiff in this case had a constitutionally protected right to participate in the Democratic Party primary in March, 1972, and appears to have relied on *U.S.* v. *Classic,* 313 U.S. 299, 61 S.Ct. 1031 (1941). We did not urge in the district court that there was no federal jurisdiction to consider infringement of the right to vote in primaries and we do not so urge here. We do suggest, however, that there is nothing in *U.S.* v. *Classic* to warrant any assumption that *Classic* announced a right to participate in the nominating primary of a particular political party. *Classic* established that the federal government had authority to protect the rights of people to participate in the election process. In *Classic* the question facing the court was whether or not a fraudulent count of the votes in a primary de-

prived electors of rights secured by the United States Constitution. *Smith* v. *Allwright, supra,* followed *Classic* and certainly since that time there has been no doubt in the mind of serious people of federal jurisdiction of the question of whether a state can constitutionally prohibit participation in some political party's primary. The court in considering Section 7-43(d) mistakenly attributes to Section 7-43(d) an effect, i.e. denial of participation in the primary, which the statute does not have. With that as a point of departure we respectfully suggest that the outcome was inevitable.

The long existing presumption of constitutional validity of the acts of the legislature has been totally ignored here. See *McGowan* v. *State of Maryland,* 366 U.S. 420, 81 S.Ct. 1101 (1961) and *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S.Ct. 1404 (1969). This presumption, we suggest, requires at minimum, facts sufficient to establish that a federal constitutional right has been interfered with by a state statute prior to that statute being held unconstitutional. This was not done in this case. In granting the plaintiff's motion for summary judgment (App. 49), the court did not require that the plaintiff demonstrate even by affidavit that facts existed which, if true, would warrant the court finding that a federally protected right had been denied. As we have heretofore demonstrated in Section II of our brief, the complaint was not sufficient to warrant relief being granted even if all of the facts alleged there were true.

Assuming, arguendo, that the complaint alleged facts which, if true, would show an interference with a federally protected right, the district court should have so

ruled and afforded to the defendants an opportunity to present facts which might tend to justify that impairment of the constitutional right by the state. This failure to do so appears to place the right to vote and the right of association on a plane higher than that of the other rights protected by the Constitution of the United States. In *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438 (1944) this Court, considering the First Amendment right of religious freedom, observed that it doubted that any of the great liberties protected by the First Amendment could be given a higher place than others. We respectfully suggest that the conduct of the district court in this case has effectively denied to the defendants the right to due process of law granted by the Fifth Amendment to the Constitution of the United States. This must mean that states have no rights under the Fifth and Tenth Amendments or that there is an order of priority among the rights protected by the Bill of Rights. We cannot accept such a notion and respectfully say that this Court should not. It is particularly urgent in view of the fact that prior to the district court's decision in this case there was no reason to believe that anything in the plaintiff's complaint warranted offering of evidence to demonstrate a "compelling state interest".

Probably even more important in considering the action of the district court is the fact that the court in effect usurped the states power to regulate the right to vote as protected under Article I, Section 2, Article I, Section 4 and Amendment X to the Constitution of the United States. Article I, Section 2 and Article I, Section 4 have had occasion to be re-examined by this Court in the light of efforts by the United States Congress to enact laws

governing qualifications of voters. As long ago as *Minor* v. *Happersett,* 88 U.S. 162 (1874) in considering the import of Article I, Section 4, particularly on the question of the right of Congress under the Time, Place and Manner Clause stated:

> It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts.

In 1970, the Congress did act. In considering the legislation resulting, in *State of Oregon* v. *Mitchell,* 400 U.S. 112, 91 S.Ct. 260 (1970), this Court recognized that the states have a right to determine who may vote except as that right may be restricted by the clear mandate of a provision of the United States Constitution. Under the authority of Article I, Section 2, Article I, Section 4 and the Tenth Amendment to the Constitution of the United States, the State of Illinois acted and neither the district court nor the plaintiff apparently gave any thought to these constitutional provisions. This Court recognized in *Twining* v. *New Jersey,* 211 U.S. 78, 29 S.Ct. 14 (1908) and *Hurtado* v. *California,* 110 U.S. 516, 4 S.Ct. 111 (1884) that each state has a right to govern its people and order its affairs except as the United States Constitution has withdrawn the power. This Court has not ruled that the Constitution has vested in the United States or in any federal court the right to determine who may participate in a particular political party primary or the conditions under which that participation may be had.

The district court, at the time it entered its judgment, was aware that its decision would have a significant impact on the March 21, 1972 Democratic primary that the plaintiff wished to vote in. As Judge Marovitz said in his dissenting opinion (App. 64):

> We would be equally remiss if we were not cognizant of the fact that party allegiances are powerful and can quite easily lead to nefarious inter-party raiding absent any restrictions. [See Dreiske, *GOP Primary Ploy,* Chicago Sun-Times, March 1, 1972, p. 40, which indicates that Republicans are being urged on a large scale to cross over into Democratic Primary on March 21, 1972 since there are no real contest in the Republican Primary. The article indicates that an even greater cross over would take place were it not for the twenty-three month rule.]

The fears of the dissenting judge were well founded. Though the record does not show it, two weeks after the majority's decision, the political commentators were astounded when the Democratic nomination for Governor was won by a candidate who had been given no chance by the established political commentators and analysts. Likewise, the Democratic nomination for State's Attorney of Cook County was won by an individual who had no organized Democratic Party support. Both candidates were nominated with overwhelming support in Republican areas in which the Democratic primary vote reached historic proportions. The Democratic Party nominee for State's Attorney of Cook County did not win in the general election when the same Republican areas turned to the Republican fold. It appears that the majority of the district court was influenced by the political winds blowing across the Northern District of Illinois.

The majority opinion of the district court in its discussion of the "twenty-three month rule" clearly shows that the court substituted its judgment for that of the Illinois legislature. Any thought that the affiliation of twenty-three months required by the Illinois Election Code is too long should be set to rest by the decision of this Court in *Lippitt* v. *Cipollone, supra.* In *Lippitt* the district court found constitutional certain sections of the Ohio Rev. Code regulating candidacy for, and sufferage in primary elections. One of those sections, § 3513.19 provides:

> At a primary election every qualified elector who is eighteen or more years of age, and who is a member of or is affiliated with the political party whose primary election ballot he desires to vote, shall be entitled to vote such ballot at such primary election. It is the duty of any witness or challenger and of any judge or clerk of elections and the right of any elector, whenever he doubts that a person attempting to vote at a primary election is legally entitled to vote at such election, to challenge the right of such person to vote. The right of a person to vote at a primary election may be challenged upon the following grounds:
> (A) That the person whose right to vote is challenged is not a legally qualified elector;
> (B) That he has received or has been promised some valuable reward or consideration for his vote;
> (C) That he is not affiliated with or is not a member of the political party whose ballot he desires to vote.
> Membership in or political affiliation with a political party shall be determined, as to one who has voted in a previous regular state election at which he voted. If he states under oath that at the next preceding regular state election at which he voted, he voted

> for a majority of the candidates of that political party of which, at the time of the challenge, he claims to be a member, or with which he then claims to be affiliated, he shall be deemed to be a member of and affiliated with such political party. If a person states under oath that he has not voted at a previous regular state election and that he desires to be a member of and affiliated with a particular political party, he shall be deemed to be a member of and affiliated with such political party.

A three-judge district court approved of that requirement and on appeal, this Court affirmed the decision of the district court. § 7-43(d) does not require more. The only problem in the case at bar is the question of whether participation in the municipal primary determines the political party in whose primary a voter may participate on the statewide level. This question of state law has not been resolved by the Illinois courts. We suggest that the district court was wrong in deciding that there were no unsettled questions of state law at issue in this case. The Illinois Courts may determine that § 7-43(d) applies separately on each level of government or that it is not a limitation in municipal primaries.

In any event, the decision of the district court was improper and should be set aside.

CONCLUSION.

The district court has ignored the large body of jurisprudence relating to proper pleading and election law and reached a result which is intolerable. For all of the reasons set out in this brief, the defendants pray that this Court reverse the decision of the district court.

Respectfully submitted,

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June 7, 1973

APPENDIX

PERTINENT PROVISIONS OF THE ILLINOIS ELECTION CODE

Deputy Registrars.

§ 6-50.2. If the board of election commisioners determines to appoint deputy registrars as provided in this Section, it shall select deputy registrars in such manner that the convenience of the public is served, giving due consideration to both population concentration and area. There shall be not less than 2 deputy registrars for each 10,000 population, or fraction thereof, in each ward or township. Deputy registrars shall be selected so that there are an equal number of deputy registrars from each of the 2 major political parties in each ward or township. Any qualified elector residing within the jurisdiction of the board of election commissioners, including city, village, incorporated town or township clerks or their duly authorized deputies, may be appointed by the board of election commissioners as a deputy registrar.

A deputy registrar appointed under this Section may accept the registration of any qualified voter residing within the jurisdiction of the board of election commissioners at such place as the board of election commissioners designate at the time of appointment. Such deputy registrars may accept registrations at any time except on any day on which registrations may not be accepted at the office of the board of election commissioners because of the proximity of such day to an election.

(Pertinent Provisions of the Illinois Election Code)

Appointments of deputy registrars under this Section shall be for a term of one year commencing January 1. Each deputy registrar shall take the oath set forth in Section 6-33 in the manner therein provided. The board of election commissioners shall issue a certificate of appointment to each deputy registrar. Such deputy registrars may be paid a reasonable compensation as determined by the board of election commissioners.

The board of election commissioners shall publish the names and addresses of all deputy registrars at least once each year in a newspaper having a general circulation in the city, village or incorporated town. Such publication shall be not less than 30 days nor more than 60 days before the closing of registration for the next election. [Amended by Act Approved Sept. 15, 1969, H.B. 294, Public Act 76-1272.]

Petition for Nomination — Form —Number of Signers — Statement of Candidacy — Requisites — Withdrawal and Revocation of Petition — False Swearing, Perjury and Forgery.

§ 7-10. The name of no candidate for nomination, or State central committeeman, or township committeeman, or precinct committeeman, or ward committeeman or candidate for delegate or alternate delegate to national nominating conventions, shall be printed upon the primary ballot unless a petition for nomination has been filed in his behalf as provided in this Article in substantially the following form:

We, the undersigned, members of and affiliated with the ..... party and qualified primary electors of the ..... party, in the ..... of ....., in the county

(Pertinent Provisions of the Illinois Election Code)

of ..... and State of Illinois, do hereby petition that the following named person or persons shall be a candidate or candidates of the ..... party for the nomination for (or in case of committeemen for election to) the office or offices hereinafter specified, to be voted for at the primary election to be held on the ..... day of ..... A.D. .....

Name	Office	Address
John Jones Thomas Smith	Governor Attorney General	Belvidere, Ill. Oakland, Ill.

Name ..... Address .....

State of Illinois—ss.

County of .....

I, ..., do hereby certify that I am upwards of the age of 21 [18 after July 1, 1972] years, that I reside at No. ..... street, in the ..... of ..... county of ..... and State of Illinois, and that the signatures on this sheet were signed in my presence, and are genuine, and that to the best of my knowledge and belief the persons so signing were at the time of signing the petition qualified voters of the ..... party, and that their respective residences are correctly stated, as above set forth.

.....

Subscribed and sworn to before me this ..... day of ..... A.D. .....

.....

Each sheet of he petition other than the statement of candidacy and candidate's statement shall be of uniform

size and shall contain above the space for signatures an appropriate heading giving the information as to name of candidate or candidates, in whose behalf such petition is signed; the office, the political party represented and place of residence; and the heading of each sheet shall be the same.

Such petition shall be signed by qualified primary electors residing in the political division for which the nomination is sought in their own proper persons only and opposite the signature of each signer, his residence address shall be written or printed (and if a resident of a city having a population of over 10,000 by the then last preceding Federal census, the street number of such residence shall be given). However the county or city, village or town, and state of residence of the electors may be printed on the petition forms where all of the electors signing the petition reside in the same county or city, village or town, and state. Standard abbreviations may be used in writing the residence address, including street number, if any. At the bottom of each sheet of such petition shall be added a statement signed by an adult resident of the political division for which the candidate is seeking a nomination, stating his residence address (and if resident of a city having a population of over 10,000 by the then last preceding Federal census, also stating the street and number of such residence), certifying that the signatures on that sheet of the petition were signed in his presence, and are genuine, and that to the best of his knowledge and belief the persons so signing were at the time of signing the petitions qualified voters of the political party for which a nomination is sought. Such statement shall be sworn to before some officer authorized to administer oaths in this State.

(Pertinent Provisions of the Illinois Election Code)

Such sheets before being filed shall be neatly fastened together in book form, by placing the sheets in a pile and fastening them together at one edge in a secure and suitable manner, and the sheets shall then be numbered consecutively. The sheets shall not be fastened by pasting them together end to end, so as to form a continuous strip or roll. Each petition shall include as a part thereof, a statement of candidacy for each of the candidates filing, or in whose behalf the petition is filed. This statement shall set out the address of such candidate, the office for which he is a candidate, shall state that the candidate is a qualified primary voter of the party to which the petition relates and is qualified for the office specified (in the case of a candidate for State's Attorney it shall state that the candidate is at the time of filing such statement a licensed attorney-at-law of this State), shall request that the candidate's name be placed upon the official ballot, and shall be subscribed and sworn to by such candidate before some officer authorized to take acknowledgment of deeds in the State and shall be in substantially the following form:

Statement of Candidacy

Name	Address	Office	District	Party
John Jones	102 Main St. Belvidere, Illinois	Governor	Statewide	Republican

State of Illinois—ss.
County of .....

I, ..., being first duly sworn, say that I reside at ..... Street in the city (or village) of

(Pertinent Provisions of the Illinois Election Code)

..... in the county of ..... State of Illinois; that I am a qualified voter therein and am a qualified primary voter of the ..... party; that I am a candidate for nomination (for election in the case of committeeman and delegates and alternate delegates) to the office of ..... to be voted upon at the primary election to be held on the ..... day of ..... A.D. .....; and I am legally qualified (including being the holder of any license that may be an eligibility requirement for the office I seek the nomination for) to hold such office and I hereby request that my name be printed upon the official primary ballot for nomination for (or election to in the case of committeemen and delegates and alternate delegates) such office.

Signed .....

Subscribed and sworn to (or affirmed) before me by ....., who is to me personally known, this ..... day of ..... A.D. 19.....

Signed .....

Official character.

(Seal, if officer has one.)

The petitions, when filed, shall not be withdrawn or added to, and no signatures shall be revoked except by revocation filed in writing with the clerk or other proper officer with whom the petition is required to be filed, and before the filing of such petition. Whoever forges the name of a signer upon any petition required by this Article is deemed guilty of a forgery and on conviction thereof shall be punished accordingly.

Petitions of candidates for nomination for offices herein specified, to be filed with the same officer, may contain the

names of 2 or more candidates of the same political party for the same or different offices.

Such petitions for nominations shall be signed:

(a) If for a State office, or for delegate or alternate delegate to be elected from the State at large to a National nominating convention by not less than 5,000 nor more than 10,000 primary electors of his party.

(b) If for a congressional officer or for delegate or alternate delegate to be elected from a congressional district to a national nominating convention by at least one-half of one per cent of the qualified primary electors of his party in his congressional district, except that for the first primary following a redistricting of congressional districts such petitions shall be signed by at least 600 qualified primary electors of the candidate's party in his congressional district.

(c) If for a county office (including county board member and chairman of the county board where elected from the county at large), by at least one-half of one per cent of the qualified electors of his party cast at the last preceding general election in his county. However, if for the nomination for county commissioner of Cook County, then by at least one-half of one per cent of the qualified primary electors of his party in his county in the district or division in which such person is a candidate for nomination; and if for county board member from a county board district, then by at least one-half of one per cent of the qualified primary electors of his party in the county board district.

(d) If for a city, incorporated town, town or village office to be filled by the electors of the entire city, incorporated town, town or village, by at least one-half of one per cent of the qualified primary electors of his party in the

city, incorporated town, town or village; if for alderman, by at least one-half of one per cent of the voters of his party of his ward.

(e) If for State central committeeman, by at least 100 of the primary electors of his party of his congressional district.

(f) If for a candidate for trustee of a sanitary district, by at least one-half of one per cent of the primary electors of his party, from such sanitary district.

(g) If for a candidate for judicial office, by at least 500 qualified primary electors of his judicial district or circuit, as the case may be.

(h) If for a candidate for precinct committeeman, by at least 10 primary electors of his party of his precinct; if for a candidate for ward committeeman, by not less than 10% nor more than 16% of the primary electors of his party of his ward; if for a candidate for township committeeman, by not less than 5% nor more than 8% of the primary electors of his party in his township or part of a township as the case may be.

(i) If for any other office by at least 10 primary electors of his party of the district or division for which nomination is made.

For the purposes of this Section, when a petition is to be filed with the Secretary of State, the number of primary electors shall be determined by taking the total vote cast, in the applicable district, for the candidate for such poltical party who received the highest number of votes, state-wide, at the last general election in the State. In other subdivisions of the State, municipality, or subdivision thereof, the number of primary electors shall be determined by taking the total vote cast for the candidate for such political party

who received the highest number of votes in the State, subdivision thereof, or municipality or subdivision thereof, at the last general or municipal election within the same.

For the purpose of determining eligibility to sign a petition for nomination or eligibility to be a candidate under this Article, a "qualified primary elector" of a party (1) is an elector who has not requested a primary ballot of any other party at a primary election held within 2 years of the date on which the petition must be filed or (2) is a first-time voter in this State registered since the last primary of an even numbered year preceding the date on which the petition must be filed, but no such person may sign petitions for or be a candidate in the primary of more than one party. However, in the case of the first primary following the election at which a party first qualifies as a "political party", as defined in Section 7-2, a "qualified primary elector" of such party is an elector who has not requested a primary ballot of any other party at any primary election held within 2 years of the date on which the petition must be filed.

Judges of primary.

§ 7-26. The judges of general elections for state and county officers, for city and village officers and for incorporated town, town and other municipal officers, are hereby constituted respectively the judges of primary elections in their respective precincts, under the provisions of this Article.

Judges absent, etc. — Vacancies.

§ 7-28. If, at the time for opening of a primary, one of the primary judges be absent, or refuse to act, the judges

present shall appoint some qualified primary elector of the precinct to act in his place. If two of the primary judges be absent or refuse to act, the judge present shall fill the vacancies in the same manner, as above provided. If all of the primary judges be absent, or refuse to act, the primary electors present, who reside in the precinct, shall select the appropriate number of themselves to act as primary judges. The judges so selected and appointed shall take the same oath, have the same powers, and perform the same duties and be subject to the same penalties as regularly constituted election judges. [Amended by Act approved July 6, 1957.]

Voter—Party Affiliation, etc.

§ 7-44. Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges, one of whom shall thereupon announce the same in a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place. When Article 4, 5 or 6 is applicable the Certificate of Registered Voter therein prescribed shall be made and signed and the official poll record shall be made. If the person desiring to vote is not challenged, one of the primary judges shall give to him one, and only one, primary ballot of the political party with which he declares himself affiliated, on the back of which such primary judge shall endorse his initials in such manner that they may be seen when the primary ballot is properly folded. If the person desiring to vote is challenged he shall not receive a primary ballot from the primary judges until he shall have established his right to vote as herein provided. No person who refuses to state his party affiliation shall be allowed to vote at a primary.

(Pertinent Provisions of the Illinois Election Code)

Challenged Voter — Affidavits — Form.

§ 7-45. Whenever a person offering to vote at a primary is challenged, the person so challenged shall make and subscribe an affidavit in the following form, which shall be presented to and retained by the primary judges and returned by them affixed to the primary poll book or with the official poll record:

State of Illinois—ss.

County of .....

I ..... do solemnly swear (or affirm) that I am a citizen of the United States, of the age of 21 years or over, and am qualified to vote under and by virtue of the Constitution and laws of the State of Illinois and am a legally qualified voter of the precinct; that I now reside at ..... (insert street and number, if any) in this precinct, and am a member of and affiliated with the .... party that I have not voted at a primary of another political party within a period of 23 calendar months prior to the calendar month in which this primary is being held and that I voted at the ..... city, village, incorporated town, or town primary, with the ..... political party at the ..... election held in ..... A.D. .... which the .... political party was entitled at such primary to make nominations of candidates for city, village, incorporated town or town offices only, and for no other offices, and that the name or names of no candidate or candidates of the ..... political party (the political party with which the primary elector declares himself affiliated) were, at such city, village, incorporated town or town primary, printed on the primary ballot that I have not signed the petition for nomination of a candidate of a political party with which

(Pertinent Provisions of the Illinois Election Code)

I am not affiliated, and that I have not signed the nominating papers of an independent candidate for any office for which office candidates for nomination are voted for at this primary.

.....

Subscribed and sworn to before me, this ..... day of ..... A.D. .....

.....

Judge of Primary

In addition to such affidavit the person so challenged shall produce the affidavit of one voter of the precinct, who shall be a qualified voter at such primary, and who shall be personally known or proved to the judges to be a voter in the precinct, which affidavit shall be in the following form:

State of Illinois—ss.

County of .....

I, ..., do solemnly swear (or affirm) that I am a voter of this precinct and entitled to vote at this primary; that I am acquainted with ..... (name of the party challenged), whose right to vote at this primary has been challenged; that I know him to be an actual bona fide resident of this precinct, and that he has resided herein 30 days, and I verily believe he has resided in this State 6 months next preceding this primary; that I verily believe he is a member of and affiliated with the ..... party.

.....

Subscribed and sworn to before me, this ..... day of ..... A.D. .....

.....

Judge of Primary

[Amended by Public Act 77-1653, effective September 27, 1971.]

(Pertinent Provisions of the Illinois Election Code)

Selection of Judges of Election in Each Precinct.

§ 14-1. The board of election commissioners established or existing under Article 6 shall, at the time and in the manner provided in Section 14-3.1, select and choose 5 electors, men or women, as judges of election for each precinct in such city, village or incorporated town.

Where neither voting machines nor electronic, mechanical or electric voting systems are used, the board of election commissioners may, for any precinct with respect to which the board considers such action necessary or desirable in view of the number of voters, and shall for general elections for any precinct containing more than 600 registered voters, appoint in addition to the 5 judges of election a team of 5 tally judges. In such precincts the judges of election shall preside over the election during the hours the polls are open, and the tally judges, with the assistance of the holdover judges designated pursuant to Section 14-5.2, shall count the vote after the closing of the polls. The tally judges shall possess the same qualifications and shall be appointed in the same manner and with the same division between political parties as is provided for judges of election. The foregoing provisions relating to the appointment of tally judges are inapplicable in counties with a population of 1,000,000 or more.

To qualify as judges the electors must:

(1) be citizens of the United States;

(2) be of good repute and character;

(3) be able to speak, read and write the English language;

(4) be skilled in the 4 fundamental rules of mathematics;

(Pertinent Provisions of the Illinois Election Code)

(5) be of good understanding and capable;

(6) not be candidates for any office at the election and not be elected committeemen;

(7) reside and be entitled to vote in the precinct in which they are selected to serve, except that in each precinct not more than one judge of each party may be appointed from outside such precinct. Any judge so appointed to serve in any precinct in which he is not entitled to vote must be entitled to vote elsewhere within the county which encompasses the precinct in which such judge is appointed and such judge must otherwise meet the qualifications of this Section.

The board of election commissioners may select 2 additional judges of election, one from each of the major political parties, for each 200 voters in excess of 600 in any precinct having more than 600 voters as authorized by Section 11-3. These additional judges must meet the qualifications prescribed in this Section. [Amended by Act approved September 15, 1969, Public Act 76-1224, S.B. 129.]

§ 14-2. (Repealed by Act approved June 27, 1967.)

§ 14-3. (Repealed by Act approved August 20, 1969, Public Act 76-881, SB 383.)

Selection of Judges.

§ 14-3.1. The board of election commissioners shall, during the month of January of each even-numbered year starting with 1968, select for each election precinct within the jurisdiction of the board 5 persons to be judges of election who shall possess the qualifications required by this Act for such judges. For each precinct, 3 judges shall be selected from one of the 2 leading political parties and the other 2 judges shall be selected from the other leading

political party. The parties entitled to 3 and 2 judges, respectively, in the several precincts shall be determined as provided in Section 14-4. The board of election commissioners shall make the selections of persons qualified under Section 14-1 from certified lists furnished by the chairman of the respective county central committees of the 2 leading political parties. Such list shall be arranged according to precincts. The chairman of each county central committee shall, insofar as possible, list persons who reside within the precinct in which they are to serve as judges. However, he may, in his sole discretion, submit the names of persons who reside outside the precinct but within the county embracing the precinct in which they are to serve. He must, however, submit the names of at least 2 residents of the precinct for each precinct in which his party is to have 3 judges and must submit the name of at least one resident of the precinct for each precinct in which his party is to have 2 judges. The board of election commissioners shall no later than November 1, 1967 and November 1 of each odd-numbered year thereafter notify the chairmen of the respective county central committees of their responsibility to furnish such lists, and each such chairman shall furnish the board of election commissioners with the list for his party on or before December 31, 1967, and December 31, of each odd-numbered year thereafter. If no such list is furnished or if no names or an insufficient number of names are furnished for certain precincts, the board of election commissioners shall make or complete such list from the names contained in the supplemental list provided for in Section 14-3.2. Judges of election shall hold their office for 2 years from their appointment and until their successors are duly appointed in the manner herein provided. The

board of election commissioners shall, subject to the provisions of Section 14-3.2, fill all vacancies in the office of judges of election at any time in the manner herein provided.

Such selections under this Section shall be confirmed by the court as provided in Section 14-5. [Added by Act approved June 27, 1967.]

Supplemental Lists.

§ 14-3.2. In addition to the list provided for in Section 14-3.1, the chairman of the county central committee of each of the 2 leading political parties shall furnish to the board of election commissioners a supplemental list, arranged according to precinct in which they are to serve, of persons available as judges of election. The board of election commissioners shall select from this supplemental list persons qualified under Section 14-1, to fill vacancies among the judges of election. If the list provided for in Section 14-3.1 for any precinct is exhausted, then selection shall be made from the supplemental list furnished by the chairman of the county central committee of the party. If such supplemental list is exhausted for any precinct, then selection shall be made from any of the persons on the supplemental list without regard to the precincts in which they are listed to serve. In any case where selection cannot be made from the supplemental list without violating Section 14-1, selection shall be made from outside the supplemental list of some person qualified under Section 14-1. [Added by Act approved June 27, 1967.]

(Pertinent Provisions of the Illinois Election Code)

Representation of Leading Political Parties in the Selection of Judges of Election.

§ 14-4. The leading political party represented by minority of all the commissioners in the board shall be entitled to 2 of the judges in each precinct with an even number, and 3 of the judges in each precinct with an odd number, and the other leading political party shall be entitled to 3 judges in the even and 2 judges in the odd number precincts, and it shall be the duty of such commissioners to observe this division in all respects in making such appointments. [Amended by Act approved June 27, 1967.]

Absence of Judges — Where Absence Wilful — Detaining Registers, etc.

§ 14-6. If, in any municipality operating under Article 6 of this Act, any judge shall not be present after the expiration of 15 minutes from the time to open the polls, or within 15 minutes from the time of closing the polls in the case of a judge appointed to count the vote or if any judge becomes ill or if any member of his immediate family becomes ill such judge may be excused from further attendance, and the judge or judges present shall fill the place of such absent judge, always selecting a person of the same political party as the party absent. One of the judges shall administer to such substitute the oath as required of the judge originally appointed, and blank forms shall be sent out by the commissioners for such purpose, which oath shall be preserved and returned to the commissioners, and such appointee shall be considered an officer of the county court, and subject to the same punishment and penalties as any other judge. Whenever such regular judge shall be

present such substitute shall cease to act. No judge shall knowingly absent himself from the polls on election day, without good cause. No judge shall knowingly detain any register or poll book or cause it not to be produced at the polling place at the opening of the polls, or for not more than 15 minutes thereafter. [Amended by Act approved September 15, 1969, Public Act 76-1224, S.B. 129.]

Assistance to Illiterate and Disabled Voters.

§ 17-14. Any voter who declares upon oath, properly witnessed and with his signature or mark affixed, that he cannot read the English language shall, upon request, be assisted in marking his ballot, by 2 of the election officers of different political parties, to be selected from the judges of the precinct in which they are to act, to be designated by the judges of election of each precinct at the opening of the polls. A voter who declares upon oath, properly witnessed, that by reason of any physical disability he is unable to mark his ballot shall, upon request, be assisted in marking his ballot by 2 of the election officers of different parties as provided above in this Section or by a relative or friend of his selection. Such voter shall state specifically what his physical disability is and the reason why he cannot vote without assistance and as to whether or not the disability is permanent. Such relative, friend or officers shall mark the ballot as directed by the voter, and shall thereafter give no information regarding the same. The judges of election shall enter upon the poll lists or official poll record after the name of any elector who received such assistance in marking his ballot a memorandum of the fact and if the disability is permanent. Intoxication shall not

be regarded as a physical disability, and no intoxicated person shall be entitled to assistance in marking his ballot.

No person shall secure or attempt to secure assistance in voting who is not physically disabled or illiterate as herein provided, nor shall any election official knowingly assist a person in voting contrary to the provisions of this Section. [Amended by Act approved September 1, 1967.]

Canvass of Votes.

§ 17-18. Immediately upon closing the polls the judges shall proceed to canvass the votes polled. They shall first count the whole number of ballots in the box. If 2 or more ballots are folded together so as to appear to have been cast by the same person, all of the ballots so folded together shall be marked and returned with the other ballots in the same conditions, as near as may be, in which they were found when first opened, but shall not be counted. If the remaining ballots shall be found to exceed the number of names entered on each of the poll lists or official poll record, the ballots shall be replaced in the box, and the box closed and well shaken and again opened and one of the judges shall publicly draw out and destroy so many ballots unopened as shall be equal to such excess; and the number of ballots agreeing with the poll lists, or being made to agree, the board shall then proceed to count and estimate and publish the votes; and when the judges of election shall open and read the ballots, 3 judges, with at least one from each political party from which the precinct judges were chosen, shall carefully and correctly mark down upon the three tally sheets the vote each candidate has received, in a separate box prepared for that purpose, with the name of such candidate at the head of such box, and the office

designated by the votes such candidate shall fill. Whenever a proposition is submitted to the electors at the same election, the ballots for or against such proposition shall always be canvassed, counted and tallied after the names of candidates for any office are canvassed, counted or tallied. The votes shall be canvassed in the room or place where the election is held, and the judges shall not allow the ballot box, or any of the ballots, or either of the poll lists or record, or any of the tally sheets to be removed or carried away from such room or place, until the canvass of the vote is completed, and the returns carefully enveloped and sealed up as provided by law.

In any election in which Representatives in the General Assembly are elected from the State at large, the vote for Representatives in the General Assembly shall be canvassed in the manner provided in Article 8A.

Where voting machines or electronic voting systems are used, the provisions of this section may be modified as required or authorized by Article 24 or Article 24A, whichever is applicable. [Amended by Act approved August 2, 1965.] [S.B. 791]

Judicial Retention Ballot Exceeding 15—Special Judges.

§ 17-18.1. Wherever the judicial retention ballot to be used in the election of November 1970 contains the names of more than 15 judges, the County Clerk or Board of Election Commissioners as the case may be, shall designate special judges of election for the purpose of tallying and canvassing the votes cast for and against the propositions for the retention of judges in office in such places and at such times as the County Clerk or Board of Election Commissioners determine. Special judges of election shall be

designated from certified lists submitted by the respective chairmen of the county central committees of the two leading political parties. In the event that the County Clerk or Board of Election Commissioners, as the case may be, decides that the counting of the retention ballots shall be performed in the precinct where such ballots are cast, an odd number of special judges of election shall be designated to tally and canvass the vote of each precinct with one more being named from the party having the majority of regular judges of election in that precinct than from the other of the 2 leading political parties. In the event that the County Clerk or Board of Election Commissioners decides that the judicial retention ballots from several precincts shall be tallied and canvassed in a central or common location, then each major political party shall be entitled to an equal number of special election judges in each such central or common location. The County Clerk or Board of Election Commissioners, as the case may be, shall inform, no later than July 15, 1970, the respective chairmen of the county central committees of the location or locations where the counting of retention ballots will be done, the number of names to be included on the certified lists, and the number of special election judges to be selected from those lists. If the certified list for either party is not submitted within thirty days after the chairmen have been so informed, the County Clerk or Board of Election Commissioners shall designate special judges of election for that party in whatever manner it determines.

The County Clerk or Board of Election Commissioners shall apply to the Circuit Court for the confirmation of the special judges of election designated under this Section. The court shall confirm or refuse to confirm such desig-

nations as the interest of the public may require. Those confirmed shall be officers of the court and subject to its disciplinary powers.

The County Clerk or Board of Election Commissioners shall, in the exercise of sound discretion, prescribe the forms, materials and supplies together with the procedures for completion and return thereof for use in such election by special judges of election. The special judges of election designated under this Section shall have full responsibility and authority for tallying and canvassing the votes pertaining to the retention of judges and the return of ballots and supplies.

The compensation of a special judge of election may not exceed $20 per judge per precinct or district canvassed.

This Section does not affect any other office or the conduct of any other election held at the same time as the election for the retention of judges in office. [Added by Act approved July 7, 1970, H.B. 3829, P.A. 76-2562.]

Manner of Canvassing Votes—Announcement.

§ 18-9. The judges of election shall first count the whole number of ballots in the box. If the ballots shall be found to exceed the number of names entered on each of the poll lists, they shall reject the ballots, if any, found folded inside of a ballot. And if the ballot and the poll lists still do not agree after such rejection, they shall reject as many of the ballots as may be necessary to make the ballots agree in number with the names entered on each of the poll lists; the ballots shall be replaced in the box and the box closed and well shaken, and again opened; and one of the judges shall publicly draw out and destroy so many ballots unopened as shall be equal to such excess. And the ballots or

poll lists agreeing, or being made to agree in this way, the board shall proceed to count the votes in the following manner: The judges shall open the ballots and place those which contain the same names together, so that the several kinds shall be in separate piles or on separate files. Each of the judges shall examine the separate files which are, or are supposed to be, alike, and exclude from such files any which may have a name or an erasure, or in any manner shall be different from the others of such file. One of the judges shall then take one file of the kind of ballots which contain the same names, and count them by tens, carefully examining each name on each of the ballots. Such judge shall then pass the ten ballots aforesaid to the judge sitting next to him, who shall count them in the same manner, who shall then pass them to a third judge, who shall also count them in the same manner. Then the third judge shall call the names of the persons named in the ten ballots, and the offices for which they are designated, and 2 of the judges, who did not assist in the counting shall tally ten votes for each of such persons, except as herein otherwise provided. When the judges shall have gone through such file of ballots, containing the same names, and shall count them by tens in the same way, and shall call the names of the persons named in the ballots and the office for which they are designated, the tally judges shall tally the votes by tens for each of such persons in the same manner as in the first instance. When the counting of each file of ballots which contain the same names shall be completed, the tally judges shall compare their tallies together and ascertain the total number of ballots of that kind so canvassed; and when they agree upon the number, one of them shall announce it in a loud voice to the other judges. The

judges shall then canvass the other kinds of ballots which do not correspond, those containing names partly from one kind of ballots and partly from another, being those usually called "split tickets", and those from which the name of the person proper to be voted for on such ballots has been omitted or erased, usually called "scratched tickets". They shall be canvassed separately by one of the judges sitting between 2 other judges, which judge shall call each name to the tally judges and the office for which it is designated, and the other judges looking at the ballot at the same time, and the tally judges making tally of the same. When all the ballots have been canvassed in this manner, the tally judges shall compare their tallies together, and ascertain the total number of votes received by each candidate and when they agree upon the numbers one of them shall announce in a loud voice to the judges the number of votes received by each candidate on each of the kinds of ballots containing his name, the number received by him on the split and scratch tickets, and the total number of votes received by him. The provisions of section 17-19 of Article 17 shall apply to the tallying of votes on straight tickets.

The votes for the offices of Governor and Lieutenant Governor shall be counted and tallied jointly.

Where voting machines or electronic voting systems are used, the provisions of this section may be modified as required or authorized by Article 24 or Article 24A, whichever is applicable. [Amended by Public Act 77-1762, effective December 8, 1971.]